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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 293

UNITED STATES OF AMERICA,
ex rel. ROCCO LO DUCA,
Petitioner,

vs.

MARCUS T. NEELLY, Director of Immigration and Naturalization, U. S. Department of Justice, Chicago District,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MARCUS T. NEELLY, Director of Immigration and Naturalization, U. S. Department of Justice, Chicago District,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Rocco Lo Duca, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit, which court, on May 12, 1954, affirmed the judgment of the United States District Court for the

Northern District of Illinois, Eastern Division. The District Court entered a judgment denying and dismissing the Petition for a Writ of *Habeas Corpus* which was directed to the District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, asking that the matter of Rocco Lo Duca's detention be inquired into by the District Court so that he may be discharged from an unlawful restraint, and deportation proceedings against him may be terminated. In the event of appeal, the District Court further ordered deportation to be stayed pending disposition of appeal and Rocco Lo Duca to remain at large under bond of One Thousand ($1,000.00) Dollars. (R. 44-45).

The Court of Appeals affirmed the judgment of the District Court in an Opinion hereto attached as Appendix I. Petition for Rehearing was denied thereafter on June 21, 1954.

JURISDICTION.

Jurisdiction of this Court is invoked under Section 1254 U.S.C.A., Title 28.

QUESTION PRESENTED.

Did the Attorney General fail to exercise his statutory discretion when he instituted an inflexible policy that no stowaway, although he met all other requirements, could be granted voluntary departure?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

8 U. S. Code 155(c), Section 19(c) of the Immigration Act of 1917, as amended:—In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948.

United States Constitution: Amendment V:—

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual servce in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE.

Petitioner is a native and citizen of Italy. He was arrested on the charge that he was found in the United States in violation of the immigration laws, and subject to deportation pursuant to the Immigration Act of 1917 in that he was a stowaway at the time of entry and was not in possession of an immigration visa. (R. 12).

A hearing was held before a Hearing Officer of the Department of Justice, Immigration and Naturalization Service. The Hearing Officer summarized the evidence adduced as follows:

1. Lo Duca is employed as a cobbler, in Chicago, Illinois.

2. His brother lives in Calumet City, Illinois.

3. The report of the Federal Bureau of Investigation shows no arrest records.

4. He was not a member of any organization except a shoe workers' union.

5. He was not a member of the Fascist Party in Italy.

6. A finding is justified that he has been a person of good moral character for the past five years.

7. The record does not indicate that he is deportable on any of the grounds set forth in 19 (d) of the Immigration Act as amended.

8. The record does not indicate that he is ineligible for naturalization. (R. 26-27).

He concluded that the petitioner was not eligible for discretionary relief. Section 155(c), 8 U.S.C., Immigration

Act of 1917, as amended, governed the proceedings. The Hearing Officer's findings and conclusion were adopted by the Assistant Commissioner, Adjudications Division. The Assistant Commissioner stated as follows:

> "It has been decided that effective administration of the Immigration laws requires the deportation of recently arrived aliens who effect their entry in an illegal manner in order to remain in the United States permanently. * * * Aliens who effect their entry as *stowaways must suffer the consequences of deportation.* * * * For these reasons counsel's exceptions are denied." (R. 33). (Emphasis supplied).

Petitioner was taken into custody for the purpose of executing an Order and Warrant of Deportation. (R. 13). Thereafter Rocco Lo Duca filed his Petition for Writ of *Habeas Corpus* in the United States District Court for the Northern District of Illinois, Eastern Division. (R. 4-9), directed against Marcus Neelly, Director of Immigration, U. S. Department of Justice, Chicago District.

The District Court entered an order that respondent Neelly show cause why a Writ of *Habeas Corpus* should not issue and further directing that petitioner be at large under bond of One Thousand Dollars ($1,000.00) (R. 11). Petitioner was released under said Bond in accordance with the court order (R. 2). Respondent Neelly filed his Answer to Show Cause why Writ of *Habeas Corpus* should not issue. (March 30, 1953) (R. 11-40). The Trial Court on October 12, 1953 entered Findings of Fact and Conclusions of Law, and Judgment Order, which provided that Petition for Writ of *Habeas Corpus* be dismissed and denied and that if there is an appeal, deportation to be stayed pending disposition of appeal and petitioner to remain at large under Bond of One Thousand ($1,000.00) Dollars (R. 40-45).

This Judgment was affirmed by the Court of Appeals for the Seventh Circuit. (Appendix I). Petition for Rehearing was denied on June 21, 1954.

Federal jurisdiction was asserted in the Petition for Writ of *Habeas Corpus* filed in the District Court in that petitioner was not granted a fair and impartial hearing by the Department of Justice and was denied due process of law. (R. 4-9). The Court of Appeals erred in ruling against petitioner on the issues set forth in the Petition.

REASONS FOR ALLOWANCE OF CERTIORARI.

A. The Court of Appeals has decided a federal question in conflict with applicable analogous decisions of this Court and raised questions of federal law which should be settled by this Court.

B. The Attorney General failed to exercise his discretion insofar as his inflexible policy disallowing all stowaways the statutory relief of voluntary departure is manifestly arbitrary and contrary to Congressional intent.

ARGUMENT.

Section 19(c) of the Immigration Act of 1917, applicable to these proceedings, 8 U. S. C., Section 155(c), as amended provides as follows:

> "In the case of any alien * * * who is deportable * * * and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States * * * in lieu of deportation."

This applicable Section of the Immigration Act sets forth the criterion upon which the relief of voluntary departure is granted an alien, *i. e.* good moral character for at least five years prior to application for voluntary departure.

In the instant case, petitioner firmly established his good moral character. It is plainly to be found as a "Finding of Fact" (R. 27) (See Report of Hearing of March 1, 1951). Furthermore, he has close ties to this country, having a brother in Illinois (R. 41).

In *United States* v. *Esposito,* D. C. N. Y. (1946) 67 F. Supp. 770, the Court held that the good conduct of an alien while serving a sentence for illegal transportation of narcotics followed by continuance of good conduct therafter could be considered to meet the requirements of good moral character for five years as a prerequisite to suspending the deportation of such alien. The Court said:

> "This court still feels that under the circumstances, if shown to be true facts, deportation could reasonably be stayed and the harsh result, which otherwise would follow not only to defendant and especially to his family, be avoided.

> "• • • I have no hesitation in recommending, provided the Attorney General is satisfied on the facts, that deportation of defendant should be suspended in accordance with the provisions of the statute (Section 155(c) Title 8 Immigration Act of 1917 as amended) above referred to." (pg. 771).

If, in that case, where the alien involved served time in prison for narcotics violation, he could receive suspension of deportation, certainly there is no possible refutation of this petitioner's position as falling within the class of those entitled to be considered for voluntary departure. His good moral character is a finding of fact. (R. 27).

In *United States ex rel. Giacalone* v. *Miller,* D. C. N. Y. (1949), 86 F. Supp. 655, the court held:

> "The Attorney General's discretion in favor of permitting voluntary departure may be exercised in the cases defined by the statute if the alien has proved good moral character for the preceding five years.
>
> "The illegal entry itself does not mar his record. Many deportation cases arise from the fact of illegal entry and it would render the provisions for discretionary relief meaningless in a sizeable portion of deportation cases • • •". (pg. 656).

We distinguish the facts involved in the instant case from the recent case of *United States ex rel. Ciannamea* v. *Neelly,* C. A. Ill. (1953) 202 F. 2d 289. The Court had before it an order of deportation against a seaman who had jumped ship and had no close relatives in the United States. The Court of Appeals for the Seventh Circuit said that the Immigration Inspector considered Ciannamea as a *mala fides* seaman, and referred to the policy of the Immigration Service not to grant voluntary departure to seamen who jump ship in order to stamp out such desertions. It was further held that the denial of voluntary departure to Ciannamea, a *mala fides* seaman who had no

close relatives in the United States, was not an abuse of discretion.

In our case, petitioner has a close relative in the United States, a brother in Illinois (R. 41); he is of admitted good moral character (R. 27), and is gainfully employed as a cobbler, a skilled tradesman (R. 26).

Because all the evidence at the hearing would indicate plaintiff's eligibility for voluntary departure, and none was indicated or adduced to the contrary, the law of the case leaves no alternative judgment for the Immigration Service but the finding of eligibility for voluntary departure. If the entire weight of evidence is—as here—on petitioner's side, no other finding can exist but that petitioner falls into the statutory class of persons entitled to voluntary departure.

The Attorney General cannot refuse the performance of duties delegated to him by the Congress of the United States. Nor can he remove his office from the requirements of due process and fair hearing which are imposed on agencies which act by virtue of powers delegated to them by Congress. *Mastrapasqua* v. *Shaughnessy*, C. A. N. Y. (1950), 180 F. 2d 999. Judge Jerome Frank delivered the Opinion of the Court, joined by Judge Augustus Hand, holding that:

> "But, in appropriate circumstances, they [courts] can compel correction of an abuse of discretion or can compel an official to exercise his discretion where he has obviously failed or refused to do so. Such an obvious refusal occurs, we think, when an official sets up a class of cases as to which he refuses ever to exercise any discretion, one way or the other, if that class is not rationally differentiated from other cases, not within the class, where he uses his discretion case by case. (pg. 1002).

"There seems to be no more rationality in this classification than there would be in arbitrarily refusing to consider discretionary relief for all left-handed men or for all whose names begin with the first thirteen letters of the alphabet. Consequently, we conclude that the classification is capricious." (pg. 1003).

Where executive officers or bodies are charged with the administration of a Statute, the Legislature must prescribe a policy or rule for their guidance. The Legislature may not constitutionally vest in them an arbitrary or unlimited discretion as to the classification of persons to whom the statute shall be applied. 16 *Corpus Juris Secundum,* Section 138, pg. 349.

In proceedings for deportation of an alien, the alien is entitled to a hearing in accordance with the requirements of due process, and these include notice, opportunity to meet charges, to be heard, and that the decision shall be governed by and based on the evidence at the hearing. *Ungar* v. *Seaman,* C. C. A. Minn., 4 F. 2d 80. There the Court stated:

"Indispensable requisites of a fair hearing, according to these fundamental principles, are that the course of the proceedings shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he shall have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; and that the decision shall be governed by and based upon the evidence at the hearing." (pgs. 82 and 83).

In enacting the legislation here involved, Congress intended to secure suspension of deportation orders or vol-

untary departure, and thereby to protect rights of aliens, —such as petitioner here—designated in the Statute. *Spector* v. *Landon,* N. C. Cal. (1951), 101 F. Supp. 439:

> "Congress, in passing the Act, desired to protect the rights of desirable aliens." (pg. 441).

The Courts will review a deportation order if there is an abuse of discretion. ***United States ex rel. Ciannamea*** v. *Neelly,* 202 F. 2d 289. The Court stated:

> "The only question before us is whether there was an abuse of discretion." (pg. 293).

This Court on March 15, 1954, handed down a decision of extreme importance as it relates to this case. The facts involved in *U. S. ex rel. Accardi* v. *Shaughnessy,* 74 S. Ct. 499, are as follows:

Petitioner Accardi was an Italian who entered this country without immigration inspection and without an immigration visa. Deportation proceedings were begun against him. Section 19(c) of the 1917 Immigration Act governed the proceedings. Petitioner was ordered deported after hearings, discretionary relief being denied to him. A Petition for Writ of *Habeas Corpus* was filed. The District Judge denied the Writ and the Court of Appeals for the Second Circuit affirmed the District Judge.

The United States Supreme Court reversed the judgment of the Second Circuit Court of Appeals. It held that petitioner was entitled to a hearing to prove his allegations.

Accardi alleged that his name was on a list prepared by the Attorney General. The names on this list were persons whose deportation was made mandatory by the Attorney General. The list was circulated by the Justice Department among all employees in the Immigration

Service and on the Board of Immigration Appeals. The issuance of this list, petitioner charged, amounted to public prejudgment by the Attorney General so that fair consideration of his case by the Board of Immigration Appeals was made impossible.

In the instant case, petitioner is also an Italian who entered this country without immigration inspection and without immigration visa. Deportation proceedings also governed by Section 19(c) of the Immigration Act of 1917 resulted in an order of deportation against him. Discretionary relief of voluntary departure was denied.

The administrative procedure in this case was likewise the same. The procedure called for decisions at three separate administrative levels below the Attorney General —Hearing Officer, Commissioner, and the Board of Immigration Appeals.

In the instant case, the Assistant Commissioner, Adjudications Division, Immigration Service, Department of Justice, entered an order adopting the recommended order of the Hearing Officer. He ordered that application of petitioner for voluntary departure be denied. He stated the following:

> "It has been decided that effective administration of the Immigration laws requires the deportation of recently arrived aliens who effect their entry in an illegal manner in order to remain in the United States permanently. * * * Aliens who effect their entry as *stowaways must suffer the consequences of deportation.* * * * For these reasons counsel's exceptions are denied." (R. 33). (Emphasis supplied).

It is petitioner's contention that his case was prejudged by this policy and that he was thereby denied the due process required by the Immigration Regulations. There was equally a failure to exercise discretion in this case as

in this most recent Supreme Court decision. The Supreme Court clearly defines the meaning of "discretion".

> "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to *his own* understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, so long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *U. S. ex rel. Accardi* v. *Shaughnessy*, 74 S. Ct. 499 at p. 503 (1954) (Emphasis supplied.)

The United States Court of Appeals for the Seventh Circuit in its Opinion notes that the *Accardi* decision was 5-4 (Appendix I, pg. 3a) and says further that:

> "It will be noted that the Assistant Commissioner did not say that the Attorney General had laid down any rigid requirements that precluded the Hearing Officers or the Boards from exercising their discretion." (Appendix I, pg. 4a).

We submit that in reality what has occurred is that the Attorney General has usurped Congressional power and aborted Congressional intent. Congress, had it so seen fit, could have foreclosed all stowaways the relief of voluntary departure. It did not do so.

We submit further as this Court stated in the *Accardi* case *(supra)*:

> "To be sure, the petition does not allege that the "Attorney General ordered the Board to deny discretionary relief to the listed aliens.' It would be naive to expect such a heavy-handed way of doing things." (p. 503).

In the present case, no one of the three levels below the Attorney General: *i. e.* the Hearing Officer, Commissioner, or Board of Immigration Appeals, could have ex-

ercised his authority according to his own understanding and conscience. The Rule of the Department denying any possibility of the statutory relief of voluntary departure to all stowaways was laid down by the Department for the purpose of being carried out by the administrative subordinates. The independent authority called for by the Regulations of each of the administrative levels below the Attorney General is nowhere to be found.

In the *Accardi* case *(supra)*, the Commissioner of Immigration told Accardi's counsel:

> "We can't do a thing in your case because the Attorney General has his name on that list of a hundred." (p. 503)

What logical difference exists between that situation and this case, where petitioner was advised that nothing could be done in his case because stowaways *must* be refused any consideration for voluntary departure?

Mr. Justice Clark, speaking for the Supreme Court, further said:

> "If petitioner can prove the allegation he should receive a new hearing before the Board without the burden of previous proscription by the list." [or by the policy, we would add in this case]. "After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its *independent discretion*, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right." (p. 504) (Emphasis supplied).

CONCLUSION.

WHEREFORE: Petitioner prays that the Writ of Certiorari may issue out and under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that Court to certify, on a day certain to be herein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 11068, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Seventh Circuit may be reversed by this Court, and that your petitioner may have such further and other relief in the premises as may seem just and proper.

Respectfully submitted,

ROCCO LO DUCA,
Petitioner,
By: FRANCIS HEISLER and
PEARL BAER,
His Attorneys.

FRANCIS HEISLER,
Of Counsel.

Chicago, Illinois,
July 10, 1954.

APPENDIX.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11068. OCTOBER TERM, 1953, APRIL SESSION, 1954.

UNITED STATES OF AMERICA ex rel. Rocco Lo Duca,
Plaintiff-Appellant,
vs.
MARCUS T. NEELLY, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 12, 1954.

Before DUFFY, SWAIM and SCHACKENBERG, *Circuit Judges.*

DUFFY, *Circuit Judge.* Relator, detained under a warrant of deportation, filed his petition in the district court for a writ of habeas corpus. After a hearing the court entered a judgment discharging the writ, dismissing the petition, and remanding relator to custody. Relator appeals. There is no dispute that relator made an illegal entry into the United States as a stowaway on or about December 10, 1948, at which date he left a vessel of unknown name by means of a small boat and landed in this country, intending to remain here permanently and not being in possession of an immigration visa.

Relator is an alien and native of Italy, where he has a wife and four minor children. He has no close relatives in this country except a brother residing at Calumet City, Illinois.

On September 5, 1950, the Acting District Director of Immigration and Naturalization at Chicago issued a warrant for the arrest of relator, and on March 2, 1951, a hearing was held before the hearing officer. Relator was there represented by counsel. The hearing officer advised relator that he might apply for permission to depart voluntarily from the United States in lieu of deportation. Relator applied for suspension of deportation, but the hearing officer found he was not eligible for suspension of deportation under the statute, because he had not resided in the United States for seven years, and was not in the United States on July 1, 1948, and because his deportation would not result in serious economic detriment to a United States citizen or a legally resident alien who is his parent, wife or minor child.

Relator's counsel took exceptions to the decision of the hearing officer, and the Assistant Commissioner of Immigration and Naturalization reviewed the record, and on June 4, 1951, denied relator's application for discretionary relief, and ordered him deported on the charges stated in the warrant of arrest. Petitioner appealed to the Board of Immigration Appeals, which Board heard oral arguments on September 20, 1951, and dismissed relator's appeal.

Before the order of deportation could be executed, relator filed a complaint to have the proceedings reviewed under the provisions of § 10 of the Administrative Procedure Act, *5 U. S. C. A.*, § *1009*. The district court found that the Commissioner of Immigration and Naturalization was an indispensable party and dismissed said complaint. Thereafter relator petitioned the Board of Immigration Appeals for reconsideration and for cancellation of the warrant of deportation and for voluntary departure. On February 17, 1953, the Board of Immigration Appeals denied said petition.

The disposition of this case is governed by the decisions of this court in *United States ex rel. Ciannamea* v. *Neelly*, 202 F. 2d 289, and *United States ex rel. Liotine* v. *Neelly*, 205 F. 2d 570. The fact that the relator in each of the foregoing cases entered this country illegally as a mala fides seaman, and the relator in the instant case is a stowaway, is no ground for distinguishing the cases. By entering this country as a stowaway, relator herein committed a felony punishable by imprisonment for not more than one year, or a fine of not more than $1,000, or both. *18 U. S. C. A.*,

§ *2199.* When Ciannamea and Liotine entered as mala fides seamen, they committed a felony punishable by imprisonment for not more than two years, or a fine of not more than $1,000, or both. *8 U. S. C. A., § 180.*

Relator claims, however, that our decisions in the *Ciannamea* and *Liotine* cases are overruled by a recent decision of the United States Supreme Court in *United States ex rel. Accardi* v. *Shaughnessy, District Director of the Immigration and Naturalization Service,* 347 U. S. 260. Accardi was admittedly deportable, but in the petition for habeas corpus it was alleged that the denial of his application for suspension of deportation was prejudged by the Board of Immigration Appeals by reason of the issuance by the Attorney General, prior to the Board's decision, of a confidential list of "unsavory characters," including Accardi's name, all of whom he planned to deport. The district court dismissed the writ without a hearing and the Court of Appeals affirmed. But the Supreme Court, by a 5 to 4 decision, held that Accardi was entitled to an opportunity in the district court to prove his allegation, and that if he shall prove it, he is then entitled to a new hearing before the Board of Immigration Appeals without the burden of a previous proscription by the Attorney General's list. The Supreme Court held that as long as the Attorney General's administrative regulation conferring discretion on the Board remains operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision. However, the court stated, p. 268: "It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations."

The administrative procedure in this case called for decisions at three levels below the Attorney General: hearing officer, Commissioner, and Board of Immigration Appeals. Relator bases his argument that this case is controlled by the Accardi case upon a statement made by the Assistant Commissioner, to wit: "It has been decided that effective administration of the immigration laws requires the deportation of recently arrived aliens who effect their entry in an illegal manner in order to remain in the

United States permanently. * * * Aliens who effect their entry as stowaways must suffer the consequences of deportation; * * *."

It will be noted that the Assistant Commissioner did not say that the Attorney General had laid down any rigid requirements that precluded the hearing officers or the Boards from exercising their discretion. As we pointed out in the Ciannamea case, the Attorney General and his subordinates are under a primary duty to consider the best interests of the United States, and we hold that the Assistant Commissioner's statement does not show either an abuse of discretion or a failure to exercise discretion.

The record herein shows that relator was afforded a fair, adequate and impartial hearing in conformity with due process of law. We think it pertinent to repeat an observation which we made in *Ciannamea*, supra, p. 293: "Congress gave to the Attorney General and not to the courts the discretion of deciding whether relator should be deported or permitted to depart voluntarily. This court has no right to substitute its judgment on this issue for that of the hearing officer."

We adhere to the decisions in *Ciannamea* and *Liotine*. Judgment

AFFIRMED.

Teste:
A true Copy:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Wednesday, May 12, 1954

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

United States of America ex rel Rocco Lo Duca Plaintiff-Appellant vs. Marcus T. Neelly, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois. Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois Eastern Division

No. 11068

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

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315182 54

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 293

UNITED STATES EX REL. ROCCO LO DUCA, PETITIONER

v.

MARCUS T. NEELLY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, U. S. DEPARTMENT OF JUSTICE, CHICAGO DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–4a; R. 55–58) is reported at 213 F. 2d 161.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1954 (R. 59; Pet. 5a). A petition for rehearing was denied on June 21, 1954. The petition for a writ of certiorari was filed on August 18, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the fact that an Assistant Commissioner of Immigration and Naturalization in denying petitioner's application for voluntary departure stated that "stowaways must suffer the consequences of deportation" constituted a prejudgment of the case.

STATUTE INVOLVED

Section 19 (c) of the Immigration Act of 1917, as amended (62 Stat. 1206, 8 U. S. C. (1946 ed.), Supp. V, 155 (c), now 8 U. S. C. (1952 ed.) 1254) provides in pertinent part:

> In the case of any alien (other than the one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.

STATEMENT

Petitioner seeks review of the judgment of the court below affirming the dismissal of a petition for a writ of habeas corpus which he filed after he had been taken into custody for deportation. Petitioner, an Italian citizen, admittedly entered the United States illegally as a stowaway in December, 1948, without immigration inspection and without an immigration visa (R. 20–21). His deportability on such ground is not contested. The petition for habeas corpus relates solely to the denial of his application for the discretionary relief of voluntary departure under section 19 (c) of the Immigration Act of 1917.

Deportation proceedings were instituted against petitioner in September, 1950, on the basis of his illegal entry into the United States (R. 18–19, 29). At a hearing held in March, 1951, petitioner was advised by the hearing officer, following his testimony that he entered the United States as a stowaway with the intent to remain permanently therein, that under section 19 (c) of the Immigration Act he could apply either for permission for voluntary departure from the United States in lieu of deportation or for suspension of deportation (R. 20–22).[1] Petitioner indicated that at

[1] The hearing officer said (R. 21–22):

"* * * you may apply for permission to depart voluntarily from the United States, at your own expense, in lieu of deportation. You may apply for suspension of deportation, if your deportation would cause a serious economic detriment

the close of the hearing he would apply for one or both forms of relief (R. 22). The hearing officer elicited testimony from petitioner that petitioner's wife and four children, all Italian citizens, were living in Italy and were supported by petitioner from his earnings as a cobbler for the Florsheim Shoe Company, Chicago, Ilinois; that he had no property of any kind in the United States; that his only close living relative in the United States was his brother; and that he had no criminal record (R. 22–23). The hearing officer found that although petitioner had been a person of good moral character for the past five years, he was not eligible for suspension of deportation since he had not resided in the United States for more than seven years, and because his deportation would not result in a serious economic detriment to a citizen, or legally resident alien of the United States who is his parent, wife or minor child. (R. 26–27.)

The application for suspension and for voluntary departure was pressed before the Assistant Commissioner who ruled (R. 33):

> * * * The respondent has not lived in the United States for seven consecutive

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to a citizen of the United States, or a legally resident alien, who is your parent, wife, or minor child. You may also apply for suspension of deportation, if you have lived in the United States for more than seven years, and if you were in this country on July 1, 1948. To be eligible for either of these privileges, you must establish that you have been a person of good moral character for the past 5 years. * * *"

years and was not living here on July 1, 1948. He does not have a spouse, parent or minor child in this country. He is therefore not eligible for suspension of deportation. His application for this form of relief will be denied.

It has been decided that effective administration of the Immigration laws requires the deportation of recently arrived aliens who effect their entry in an illegal manner in order to remain in the United States permanently. The arguments which counsel advances in his brief have been given consideration. Federal statutes provide for the criminal prosecution of aliens who enter the United States as stowaways. There is no discernible relationship between the deportation of an alien stowaway from the United States and the effective administration of the European Recovery Program. All aliens who desire to enter the United States for permanent residence must present themselves at one of our consulates abroad and apply for proper documents with which to enter this country. Aliens who effect their entry as stowaways must suffer the consequences of deportation; to do otherwise would encourage others to follow the same course of action. For these reasons counsel's exceptions are denied.

Order: It is ordered that application for suspension of deportation and voluntary departure be denied.

Petitioner's appeal to the Board of Immigration Appeals was dismissed on September 20, 1951 (R. 39) and an application for reconsideration and for cancellation of the deportation order and for voluntary departure (R. 35–38) was denied on February 17, 1953 (R. 39–40).

In his petition for a writ of habeas corpus, which was filed in March 1953, petitioner alleged, *inter alia,* that since the hearing officer had found that petitioner had been a person of good moral character for the preceding five years, the denial of the request for voluntary departure was arbitrary (R. 5–9).

The District Court denied the petition (R. 44). On appeal, the Court of Appeals affirmed (R. 59; Pet. 5a) holding that there was neither abuse of nor failure to exercise discretion at any point in the administrative proceedings (R. 57–58; Pet. 3a–4a).

ARGUMENT

Relying upon the Assistant Commissioner's statement that "aliens who effect their entry as stowaways must suffer the consequences of deportation", petitioner now argues that there was a failure to exercise discretion in his case;[2]

[2] Petitioner does not press the contention made in his habeas corpus petition that he was entitled as of right to the relief of voluntary departure because the hearing officer found him to be of good moral character for the five years preceding the deportation hearing. The meeting of minimal requirements does not make the grant of relief mandatory rather than discretionary. See *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268; *United States* v. *Neelly*, 202 F. 2d 289, 293 (C. A. 7).

that the statement reflects a rigid rule which had to be followed in petitioner's case, regardless of its merits. There is, however, nothing in the statement or elsewhere in the record to support the view that the Assistant Commissioner was following a rigid requirement by the Attorney General that precluded the exercise of his independent discretion. He was merely enunciating a general principle which he used on his own initiative as a guide in the exercise of his individual discretion.

The requirement of the exercise of independent judgment at each administrative level does not prevent the immigration officials from establishing such general rules of guidance, provided that they are reasonable. See *Mastrapasqua* v. *Shaughnessy,* 180 F. 2d 999 (C. A. 2). In fact the operation of a fair and orderly system of administration necessitates such procedures.

The Assistant Commissioner's opinion indicates that "The arguments which counsel advances in his brief have been given consideration." (R. 33.) The rejection of such arguments does not show a failure to exercise discretion. Petitioner's contention, in essence, charges failure to exercise discretion merely because that discretion was not exercised in his favor.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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